Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

(4)

APPENDIX A

NO. 91-66

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

VICTOR STEPHENS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDICES

JAMES H. EVANS
ALABAMA ATTORNEY
GENERAL

WILLIAM D. LITTLE,
ALABAMA ASSISTANT
ATTORNEY GENERAL
COUNSEL OF RECORD
COUNSEL FOR
RESPONDENT

OFFICE OF THE
ATTORNEY GENERAL
ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(205) 242-7406

IN THE SUPREME COURT OF ALABAMA

VICTOR R. STEPHENS, Appellant,	*	APPEALED FROM THE CIRCUIT COURT OF HALE
vs.	*	COUNTY, AL.
	*	
STATE OF ALABAMA, Appellee.	*	SC Case No. 91-66

PETITION FOR WRIT OF CERTIORARI

Comes now the Appellant, Victor R. Stephens, by and through his attorneys of record, Blanchard L. McLeod, Jr., and J. Patrick Cheshire, and petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above-styled cause under Rule 39 of the Alabama Rules of Appellate Procedure, and in support thereof, assigns the following, separately and severally, to-wit:

(1) Petitioner was convicted of the charge of capital murder in the Circuit Court of Hale County, Alabama on December 17, 1987, and sentenced on July 24, 1989. The Alabama Court of Criminal Appeals affirmed the judgment of the trial court with opinion on August 3, 1990. An application for rehearing was filed on August 17, 1990, and was overruled without opinion on September 21, 1990.

(2) With the application for rehearing, the Petitioner presented additional and corrected statements of fact pursuant to Rule 39 (k), ARAP, and requested the Alabama Court of Criminal Appeals to add or correct said facts in its opinion on re-hearing, which it failed to do. A copy of said additional and corrected statement of

facts are attached hereto and marked Exhibit "A", and incorporated herein by reference as if set out verbatim.

(3) The Alabama Court of Criminal Appeals case number is 2 Div. 738.

(4) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the prosecution performed misconduct under the principles set forth in Ex parte Branch, 526 So.2d 609 (Ala. 1987) and Batson v. Kentucky, 476 u.s. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), where the prosecution used 21 of its 22 peremptory strikes (95.45%) to strike blacks from the jury venire.

Batson at page 1717 states, "[t]he Equal Protection Clause (Amend. 14 U.S.

Const.) guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race." Sections 1, 6 and 22, Ala. Const. 1901, combine to guarantee Equal Protection of the law.

Recently, the Alabama Supreme Court issues the opinion of Ex parte Mary Williams, S.Ct. Case No. 89-597, released June 22, 1990. In the Williams case, the Alabama Supreme Court stated on page nine:

> "With the prima facie case established, there is a presumption that the peremptory challenges were used to discriminate against black jurors, Branch, at 623; the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge that relates to the particular case to be tried and that is nondiscriminatory." (emphasis added).

It is more than obvious in the opinion of the Alabama Court of Criminal Appeals that the court sought any and every means possible and totally disregarded the Batson, Branch, and Williams guidelines to effectively deny your appellant Equal Protection under the United States Constitution and the Alabama Constitution.

Your appellant would specifically cite the opinion of the Alabama Court of Criminal Appeals on pages eight and nine wherein the court states as the total basis for the logic in disqualifying the following jurors:

"8. Ms Spence--sons had been involved in 'some very serious criminal offenses.'

9. Ms. Johnson--had been a defendant in small claims curt and been served with numerous civil suits; appeared to be extremely responsive to

the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.

11. Mr. Pratcher--although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.

13. Ms. Shelton--prosecution found it 'extremely strange' that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.

15. Ms. B. Wilson--county sheriff was acquainted with juror and recommended that she be struck because she was 'extremely anti-establishment' and because of belief that her husband had been involved in some type of criminal activity.

16. Ms. A. Harris--young, single, and umemployed; knew nothing of the facts surrounding the case.

17. Mr. K. Williams--general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. Ms. Brown--husband a homicide victim; however, sheriff's department was concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. Ms. Haynes--seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

21. Ms. S. Harris--relatives had been in trouble with the law."

None of these strikes outlined above can in any way have "...clear, specific and legitimate reasons for the challenge that relates to the particular case to be tried and that is nondiscriminatory." Branch, at 623 as cited in Williams at page nine. Further, the Alabama Court of Criminal Appeals totally disregarded its own Avery, Madison decisions as well as Branch and Batson when it failed to even address the following point raised by your appellant.

The justification for the State's strikes ranges from the ridiculous (chewing gum, (R-390, 391), to the sublime (wearing sunglasses, R.-391). However, in all instances where the State indicated that it might have some information that was gained by investigation prior to voir dire, the State never tried to investigate this information in any manner during voir dire. As the court stated in Avery v. State, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one

factor supporting an inference that the challenge is based on groups bias.'" People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in Avery, supra, at page 127. As the court affirmed in Madison v. State, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in Ex parte Branch, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he never chose to do so. Therefore, one must assume the systematic group exclusion of blacks. The very thing Batson sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R-390, 391), and wearing sunglasses, (R-391), upon its intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." Branch, supra, at page 623 citing Batson, supra, at page 1723.

(5) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the trial court abused its discretion in denying defendant's Motion for Mistrial based upon prosecutor's comment during closing arguments that the attorney for the defendant was attempting to hide

evidence from the jury since such statement was ineradicably prejudicial and imparted to the jury the impression that the defense counsel was engaged in an illegal activity in denying the jury access to all evidence in the case.

While it may be within the realm of fair comment for the prosecutor to attempt to address points raised by the defendant's counsel in closing argument, to allow a personal attack upon the veracity of counsel for the defendant is extremely prejudicial in that it focuses the attention of the jury away from the facts in dispute onto the personality and reputation of counsel.

(6) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal

Appeals failed to adequately address the issue of whether or not the State prosecutor committed reversible error when he tried to impeach the defendant for an offense for which he was not convicted.

The Court of Criminal Appeals used the Harmless Error Rule in upholding this reversible error. But, how can the error be harmless when the defendant testified for the mitigating circumstances of remorse and repentance of his previous life of crime. Although it may be proper for the prosecution to cross examine the defendant regarding prior criminal convictions, it is extremely prejudicial to the appellant's argument for the prosecution to address possible criminal activity that has never been

proven and of which the appellant has never been arrested.

(7) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not there was insufficient evidence adduced at trial to sustain a conviction as well as a failure of the State to carry the burden of proof with regard to the offense of capital murder: therefore, it was reversible error for the trial court to deny the defense motion for a judgment of acquittal at the conclusion of the trial.

The decision of the Court of Criminal Appeals hinges only on the allowability of circumstantial evidence. The court totally fails to

acknowledge the dying declaration of the only eyewitness to the offense. The court does cover in its statement of the facts when it states on page seven:

> "The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. when asked if the robbers were white or black, Mr. Pickens stated, 'white.'"

(8) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the death penalty imposed by the trial court judge in this cause should be reversed.

There is absolutely no justification stated in the August 3, 1990, decision of the Alabama Court of Criminal Appeals which would provide any facts to the trial court that were not known to the trial jury that would justify the reversal by the trial jury when it imposed life without parole in this case.

(9) The basis of this Petition for Writ of Certiorari is that the decision of the Alabama Court of Criminal Appeals failed to adequately address the issue of whether or not death by electrocution as applied by the State of Alabama constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States

of America and Article 1, Section 15 of the Constitution of the State of Alabama.

In light of recent developments concerning the reconditioning of the Alabama electric chair as a result of the necessity of using repeated shocks to bring about the death of the condemned individual which has been widely reported in the press, the court should take judicial knowledge thereof.

(10) In light of the recent study of the United States General Accounting Office, the Alabama Supreme Court should consider the issue of whether or not the application of the death penalty is discriminatory in nature, and, therefore, violative of the Fourth, Fifth, Sixth, Eighth and

Fourteenth Amendments of the United States Constitution of America and the appropriate provisions of the Alabama Constitution (1901). A copy of this United States General Accounting Office report is annexed and marked as Exhibit "B" to this Petition for Writ of Certiorari. Because of this recently discovered evidence, your Petitioner is presenting this issue in this Petition for Writ of Certiorari and will file a supplemental brief with reference to this issue.

WHEREFORE, your Petitioner respectfully requests that after preliminary examination, this Writ of Certiorari be granted and that this Honorable Court proceed under its rules to review this matter complained of, and to reverse the judgment of the

Alabama Court of Criminal Appeals, and for such other relief as your Petitioner may be entitled.

Submitted in support thereof is the Brief with Argument of your Petitioner.

Respectfully submitted,

_____

Blanchard L. McLeod
Of Counsel for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of October, 1990, served a copy of this Petition for Writ of Certiorari and Brief on the Alabama Court of Criminal Appeals and the Attorney General of Alabama by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

_____

Blanchard L. McLeod, Jr.
Of Counsel for Petitioner

OF COUNSEL:

BLANCHARD L.
McLEOD, JR.
Attorney at Law
P. O. Box 656
Selma, AL.
36702-0656
(205) 875-2282

J. PATRICK CHESIRE
Attorney at Law
P. O. Box 2365
Selma, AL
36702-2365
(205) 872-6440

STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

* * * * * * * * * * *

VICTOR R. STEPHENS,	*	
	*	
Appellant,	*	
	*	
vs.	*	SC Case No.
	*	91-66
THE STATE OF ALABAMA,	*	
	*	
Appellee.	*	

On Appeal from the Circuit Court
of Hale County, Alabama
Hon. Charles A. Thigpen, Judge

PETITION FOR WRIT OF CERTIORARI AND BRIEF OF APPELLANT, VICTOR R. STEPHENS

OF COUNSEL:

BLANCHARD L.
McLEOD, JR.
Attorney at Law
P. O. Box 656
Selma, AL.
36702-0656
(205) 875-2282

J. PATRICK CHESIRE
Attorney at Law
P. O. Box 2365
Selma, AL
36702-2365
(205) 872-6440

TABLE OF CONTENTS

Table of Authorities..... iii

Statement of the Case..... 1

Statement of the Facts..... 2

Issues Presented..... 13

Argument of the Appellant..... 14

Conclusion..... 33

TABLE OF AUTHORITIES

CASE	PAGE
Alford v. State Farm Fire and Gas. Co. 496 So.2d 19 (Ala. 1986)	26
Avery v. State, 545 So.2d 123 (ala.Cr.App. 1988)	21,22
Batson v. Kentucky, 476 U.S. 79 106 S.Ct. 1712, 90 L.Ed. 69 (1986)	13,14 22,23 33
Boykin v. State, 207 So.2d 412, 281 Ala. 559 (1968)	31
Cumbo v. State, 368 So.2d 871 (1979)	27
Dean v. Johnson, 206 So.2d 610 (Ala. 1968)	26
Dolvin v. State, 391 So.2d 133 (1980)	27
Ex parte Acree, 63 Ala. 234 (1879)	27
Ex parte Branch, 526 So.2d 609 (Ala. 1987)	13,14 22,33
Gregg v. Georgia, 428 U.S. 153, 96 So.Ct. 2909 (1976)	31

TABLE OF AUTHORITIES (CONT.)

CASE	PAGE
Hammins v. State, 439 So.2d 809 (Ala.Cr.App. 1983).....	24
Jackson v. State, 516 So.2d 726 (ala.Cr.App. 1985).....	31,32
Lee v. State, 227 Ala. 2, 150 So. 164 (Ala. 1933).....	31
Madison v. State, 545 So.2d 94 (Ala.Cr.App. 1987).....	22
Parker v. State, 198 So.2d 261 (Ala. 1967).....	26
People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986).....	15,22
Peoples v. Wheeler, 22 Ca.3d [258] at 280, 583 P.2d at [748] 764, 148 Cal.Rptr. [890] at 905 [1978].....	14,15
Raines v. Smith, Docket No. 83-P-1080-S (N.D.Ala.).....	32
Robinson v. State, 545 So.2d 828 (Ala.Cr.App. 1989).....	15
Sanders v. State, 426 So.2d 497 (Ala.Cr.App. 1982).....	24
Slappy v. State, 503 So.2d 503 So.2d 350, 355 (Fla. Dist.Ct.App. 1987).....	15

TABLE OF AUTHORITIES (CONT.)

CASE	PAGE
Swain v. Alabama, 380 U.S. 202 at 224, 85 S.Ct. 824 at 838, 13 L.Ed.2d 759 (1965)..	14
Washington v. Davis, 426 U.S. [229] at 242, 96 S.Ct. [2040] at 2049 [48 L.Ed.2d 597 (1976)].....	15
STATUTES	
Ala. Code Sec. 12-21-162, Code of AL, (1975).....	25
Ala. Code Sec. 13A-5-46, Code of AL, (1975).....	29
Ala. Code Sec. 13A-5-53(a), Code of AL, (1975).....	29
Amend. 8 U.S. Const.....	13,31
Amend. 14 U.S. Const.....	13,22, 31
Article 1 Section 15, Ala. Const.....	31
Sections 1, 6 and 22, Ala. Const., 1901.....	22

TABLE OF AUTHORITIES (CONT.)

CASE PAGE

LEARNED TREATISES

McElroy's Alabama Evidence, 3rd Edition, Section 145..... 25

STATEMENT OF THE CASE

On or about December 14, 1987, Victor Ramar Stephens was tried before the Circuit court of Hale County, Alabama on a two count indictment. In the indictment returned by the March 24, 1986 Session of the Grand Jury for Hale County, Alabama, Mr. Stephens was charged in count one with intentionally causing the death of Adam Pickens by shooting him with a pistol during the course of committing a theft of lawful money of the United States of America. The second count of the indictment charged Mr. Stephens with intentionally causing the death of James R. Bailey during the commission of a theft of lawful money of the United States of America. Mr. Victor Ramar Stephens was

convicted on both counts of the above said indictment and sentenced to death. It is from this conviction and sentence that the defendant appeals.

STATEMENT OF THE FACTS

On or about January 20, 1986, a robbery took place in Hale County, Alabama at Bailey's Grocery Store located on Highway 14, (R-167). During this robbery two men, Mr. James R. Bailey, age 72 and Mr. Adam Pickens, age 82, were killed, (R-166).

On January 21, 1986, Charles S. Stone of the Georgia Bureau of Investigation, Dennis Holloway of the Carroll County, Georgia Sheriff;s Department, Chief Deputy A.S. Manley of the Randolph County, Alabama, Sheriff's Department and A.B.I. Agent Ed Trayler interviewed Mr. Victor Ramar Stephens at the Carroll County Hospital, in Carroll County, Georgia, where he was being treated for a gunshot wound to

his left hand, (R.-39). During the course of this interview, Mr. Stephens stated to these representatives of law enforcement from the States of Georgia and Alabama that he had been shot the previous day at approximately 6:00 p.m. by an individual named Dennis Johns. At that time, the interview was terminated, (R-39, 40). Mr. Stephens was taken into custody for suspicion of involvement in two robberies, one occurring in Carroll County, Georgia, and the other occurring in Randolph County, Alabama, (R-59). Subsequent interviews with Mr. Stephens were held at the request of Mr. Stone and Mr. Trayler at the Carroll County Jail on the days of January 23rd and January 25, 1986, (R-27). During the course of the interview that took place on

January 23, 1986, Mr. Stone stated that he did not recall whether or not Mr. Stephens had requested Mr. Stone to aid him in getting some relief for the pain he was feeling in his injured hand in exchange for a statement concerning the offenses with which he was charged, (R-41).

As a result of the statements acquired from Mr. Stephens by Officer Stone and Trayler, Mr. Stephens was extradicted to Hale County, Alabama and was subsequently indicted for the capital murders of Mr. James R. Bailey and Mr. Adam Pickens.

The following is the transcription of the Batson motion, argument of counsel and the justification to the

Court for the strikes of the black venire persons:

> "MR. MORRIS: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of Batson Motion, and making it known to the Court that the basis of the Batson Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106, which was Mr. Wyatt. (emphasis added). We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client (R-386) is black and we feel like that is a violation of the Batson case.
>
> THE COURT: What is the composition of the venire total?
>
> MR GREENE: As I understand it, it's seven white, five black.
>
> THE COURT: The jury as struck is seven white and five black.

MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last juror? The last juror, number 38, (R-387) that was the last person struck, period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternate.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternatives, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. You've made a prima facie showing, justify your strikes. (emphasis added).

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons for reasons I would like to state in the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already of record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understand it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or (R-388)

some personal friend being so involved. The information also received was that he was some sort of part-time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions.

Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in Perry County, there was (R-389) some type of connection, a cousin or something. That's the reason we're so familiar with them.

Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was (R-390) chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense.

Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have (R-391) some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single

and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual (R-392) voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where

there is a proposed dying declaration from the deceased, "Pop," indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti-establishment. That her mother was considered by him to be a person he though well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to (R-393) be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating

with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove (R-394) her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis.

Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that

she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged their house. So we went ahead and removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 -- 39, Sarah Harris. The information reported was that she had kinspeople who had been in criminal trouble and though (R-395) we had otherwise felt that she was all right, that information caused us to remove her.

Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention

for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination.

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual (R-396) that I believe the District Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard.

Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've been sued, matters like this, in light of the -- the fact athat the State said they didn't respond to any questions or didn't seem to know anything about it, we contend that the jurors by comparison that were left on

this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corey, also responded that they knew nothing about it. She was left. A black female. Now Mrs. Marks responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew (R-397) something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strickly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be not other -- I believe she also responded -- I believe she had bumper sticker -- I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are very vague and very indecisive answers. For instance,

Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her (R-398) daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes, for the State involved two white males we thought we (R-399) had some problems with and three black

females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

I think that's all.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

At Mr. Stephens trial which began December 14, 1987, the Hon. Larry W. Morris, trial counsel for Mr. Stephens, raised an objection to the fact that of the 22 jurors struck by the State, the first 21 were black, (R-386).

During the closing arguments of the State, Mr. Ed Greene, Chief Deputy District Attorney, made an allegation to the jury that Mr. Morris was attempting to cover up all the evidence, a direct and personal attack on the character of a fellow-attorney, Mr. Morris, (R-814). Although Mr. Morris objected to this comment, the Court overruled his objection and allowed Mr. Greene to continue with his attack, (ibid.).

During the penalty phase of Mr. Stephens' trial the court allowed the State of Alabama in the person of Mr. Greene, to elicit testimony concerning a crime alleged to have been committed by Mr. Stephens in Carrollton, Georgia, although Mr. Stephens had never been convicted of the offense, (R-870, 871).

At the appellant's sentencing trial, the State's prosecutor specifically stated that there were only two aggravating circumstances that they intended for the jury to consider, (R-858). The first aggravating circumstance was the alleged event that was the basis of the trial. The second alleged aggravating circumstance had occurred 11 days before this alleged event, (R-865). The trial court specifically charged the jury that there were only two aggravating circumstances for them to consider, (R-883).

The trial jury deliberated the issue of whether life without parole or the death penalty was the appropriate penalty to impose in this case. After deliberation, the trial jury, by a

seven (58%) to five (42%) vote, determined that life without parole was the appropriate sentence to be imposed in this case, (R-906). Yet, the trial court, without justifiable causes stated, refused to give any credence to any of the mitigating issues presented by the Defense counsel before the advisory jury and sentenced the appellant to death.

The appellant was convicted of capital murder on December 17, 1987, (R-183), and sentenced to death on July 24, 1989, (R-908, et seq.).

I.

WHETHER OR NOT THE PROSECUTION PERFORMED MISCONDUCT UNDER THE PRINCIPLES SET FORTH IN EX PARTE BRANCH, 526 So.2d 609 (Ala. 1987) AND BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.ED. 69 (1986), WHERE THE PROSECUTION USED 21 OF ITS 22 PEREMPTORY STRIKES (95.45%) TO STRIKE BLACKS FROM THE JURY VENIRE.

II.

WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT"S MOTION FOR MISTRIAL BASED UPON PROSECUTOR'S COMMENT DURING CLOSING ARGUMENTS THAT THE ATTORNEY FOR THE DEFENDANT WAS ATTEMPTING TO HIDE EVIDENCE FROM THE JURY SINCE SUCH STATEMENT WAS INERADICABLY PREJUDICIAL AND IMPARTED TO THE JURY THE IMPRESSION THAT THE DEFENSE COUNSEL WAS ENGAGED IN AN ILLEGAL ACTIVITY IN DENYING THE JURY ACCESS TO ALL EVIDENCE IN THE CASE.

III.

WHETHER OR NOT THE STATE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN HE TRIED TO IMPEACH THE DEFENDANT FOR AN OFFENSE FOR WHICH HE WAS NOT CONVICTED.

IV.

WHETHER OR NOT THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO SUSTAIN A CONVICTION AS WELL AS A FAILURE OF THE STATE TO CARRY THE BURDEN OF PROOF WITH REGARD TO THE OFFENSE OF CAPITAL MURDER: THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENSE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE, AS WELL THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE TRIAL.

V.

WHETHER OR NOT THE DEATH PENALTY IMPOSED BY THE TRIAL COURT JUDGE IN THIS CAUSE SHOULD BE REVERSED.

VI.

WHETHER OR NOT DEATH BY ELECTROCUTION AS APPLIED BY THE STATE OF ALABAMA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ARTICLE 1, SECTION 15 OF THE CONSTITUTION OF THE STATE OF ALABAMA.

I.

THE PROSECUTION PERFORMED MISCONDUCT UNDER THE PRINCIPLES SET FORTH IN EX PARTE BRANCH, 526 So.2d 609 (Ala. 1987) AND BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.ED. 69 (1986), WHERE THE PROSECUTION USED 21 OF ITS 22 PEREMPTORY STRIKES (95.45%) TO STRIKE BLACKS FROM THE JURY VENIRE.

This Honorable Court is bound by Batson, supra, and Branch, supra, in consideration of this issue. In Branch, supra, the Alabama Supreme Court set forth the guidelines to be followed in this state in implementing the United States Supreme Court's decision in Batson, supra. These guidelines are as follows:

"In Ex parte Branch, 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court expounded on the relevant circumstances which a defendant could submit as leading to an inference of discrimination. Such evidence includes:

1. Evidence that the jurors in question share[d] only this one

characteristic - their membership in the group - and that in all other respects they [were] as heterogeneous as the community as a whole. [People v.] Wheeler, 22 Cal.3d [258] at 280, 583 P.2d at [748] 764, 148 Cal.Rptr. [890] at 905 [1978]. For instance, it may be significant that the person challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions, Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.

2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

3. The past conduct of the State's attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama], [380 U.S. 202 at 224, 85 S.Ct. 824 at 838, 13 L.Ed.2d 759 (1965)].

4. The type and manner of the State's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.

5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So.2d 350, 355 (Fla.Dist.Ct.App. 1987); People v.

Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 (1978).

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was not challenged. Slappy, 503 So.2d at 352 and 355.

7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. [229] at 242, 96 S.Ct. [2040] at 2049 [48 L.Ed.2d 597 (1976)].

9. The State used peremptory challenges to dismiss all or most black jurors. See Slappy, 503 So.2d at 354, Turner, supra."

Robinson v. State, 545 So.2d 828

(Ala.Cr.App. 1989) at pages 832, 833.

This trial was before the Hon.

Charles A. Thigpen, Presiding Judge of

the Fourth Judicial Circuit. The State's attorney and the Defense's attorney were allowed to conduct voir dire. Judge Thigpen, within reason, allowed both sides to conduct as exhaustive a voir dire as they chose to conduct.

In applying the facts in this case, it becomes obviously clear that the appellant has established a prima facie case of discrimination. First, the appellant is black, (R-387). The State had 22 peremptory strikes. The State used its first 21 peremptory strikes (95.45%) to strike blacks from the venire, (R-386). The last State's strike was white, (R-387). Otherwise, the State would have struck 100% black.

Having a prima facie showing of discrimination, the State was ordered to justify their strikes, (R-388). The State's grounds were as follows:

Juror Number 68: His position on capital punishment, (R-388);

Juror Number 4: Her position on capital punishment, (R-388);

Juror Number 5: That he, or some member of his family or (R-388) some personal friend being so involved. The information also received was that he was some sort of part-time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation, (R-388, 389);

Juror Number 76: Answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions, (R-389);

Juror Number 47: She asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles

the child support program. Now that was in Perry County, there was some type of connection, a cousin or something. That's the reason we're so familiar with them, (R-389, 390);

Juror Number 46: She had been arrested and charged with worthless checks and similar type offenses on several different occasions, (R-390);

Juror Number 36: She was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted, (R-390);

Juror Number 87: The information was that her sons had been in some very

serious criminal offenses. We just felt like she would not be a good State's juror in this case, (R-390);

Juror Number 49: Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury, (R-390, 391);

Juror Number 18: She asked off this jury. She did not want to serve and she answered our questions with

reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense, (R-391);

Juror Number 80: Juror indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his

feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position, (R-391, 392);

Juror Number 59: Our information is that she was single and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge,

but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror, (R-392);

Juror Number 85: This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case, (R-392);

Juror Number 97: She seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her

individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us, (R-392, 393);

Juror Number 102: Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time

and felt that she was extremely anti-establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to be very unconcerned about this very serious matter that she was about. We struck her on that basis, (R-393, 394);

Juror Number 35: She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case, (R-394);

Juror Number 98: Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray.

He seemed to be associating with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel, (R-394);

Juror Number 9: She, according to our information, had had a husband who had been killed a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove her, so we did, (R-394, 395);

Juror Number 40: We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the

nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis, (R-395);

Juror Number 43: This was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged their house. So we

went ahead and removed her for those reasons. Otherwise, we would have kept her, (R-395);

Juror Number 39: The information reported was that she had kinspeople who had been in criminal trouble and though we had otherwise felt that she was all right, that information caused use to remove her, (R-395, 396);

Juror Number 38: Indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis, (R-396).

The justification for the State's strikes ranges from the ridiculous (chewing gum, (R-390, 391), to the sublime (wearing sunglasses, R-391). However, in all instances where the State indicated that it might have some

information that was gained by investigation prior to voir dire, the State never tried to investigate this information in any manner during voir dire. As the court stated in Avery v. State, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one factor supporting an inference that the challenge is based on groups bias.'" People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in Avery, supra, at page 127. As

the court affirmed in Madison v. State, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in Ex parte Branch, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he never chose to do so. Therefore, one must assume the systematic group exclusion of blacks. The very thing Batson sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R-390, 391), and wearing sunglasses, (R-391), upon its

intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." Branch, supra, at page 623 citing Batson, supra, at page 1723.

Sections 1, 6 and 22, Ala. Const. 1901, combine to guarantee Equal Protection of the law, Branch, supra, at page 619. "The Equal Protection Clause (Amend. 14 U.S. Const.) guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race," Batson, supra, at page 1717.

Because the State's prosecutor in this case systematically discriminated against the appellant in the denial of his Equal Protection rights under the

Alabama Constitution and the United States Constitution before the first witness ever testified, the appellant's conviction must be reversed and this case remanded for a trial consistent with the Batson and Branch decisions.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BASED UPON PROSECUTOR'S COMMENT DURING CLOSING ARGUMENTS THAT THE ATTORNEY FOR THE DEFENDANT WAS ATTEMPTING TO HIDE EVIDENCE FROM THE JURY SINCE SUCH STATEMENT WAS INERADICABLY PREJUDICIAL AND IMPARTED TO THE JURY THE IMPRESSION THAT THE DEFENSE COUNSEL WAS ENGAGED IN AN ILLEGAL ACTIVITY IN DENYING THE JURY ACCESS TO ALL EVIDENCE IN THE CASE.

Although counsel for both the Defendant and the State are allowed wide latitude in drawing reasonable inferences from the evidence within the context of their closing arguments,

Sanders v. State, 426 So.2d 497 (Ala.Cr.App. 1982), however, counsel may not make prejudicial remarks on matters of which no evidence has been presented. Hammins v. State, 439 So.2d 809, (Ala.Cr.App. 1983). During the course of the trial of the appellant, Victor R. Stephens, no evidence was presented by the State that would raise even an inference that Mr. Morris, the counsel for the Defense, was attempting to cover up evidence as alleged by the prosecutor. This allegation could only give rise to an ineradicable prejudice in the minds of the jury that the Defense attorney was engaged in illegal activity.

NOW THEREFORE, the appellant would request that this Court would set aside his conviction or in the alternative,

remand this case to the trial court with instructions to grant the defense motion for mistrial.

III.

THE STATE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN HE TRIED TO IMPEACH THE DEFENDANT FOR AN OFFENSE FOR WHICH HE WAS NOT CONVICTED.

Section 12-21-162, Code of Alabama (1975), is very clear that a witness may be impeached for crimes involving moral turpidtude. Professor Gamble in Section 145, McElroy's Alabama Evidence, 3rd Edition, does an excellent job of outlining the topic of moral turpitude and covers the topic in 145.01(15) as to the manner of eliciting the witness'; conviction.

At the time of trial of the appellant's case, the very learned State's prosecutor asked the appellant:

> "Q. I see. You know a Mr. Saxon?
>
> A. Yes.
>
> Q. Do you have anything to do with a robbery of his place of business there in Carrollton, Georgia?
>
> A. No, sir.
>
> Q. You deny that?
>
> A. Yes, sir. Because Mr. Saxon knows me personally." (R-870).

The appellant's trial attorney immediately moved for a mistrial, (R-870, 871), citing the well-settled laws in this area of how to correctly question a witness regarding moral turpitude. This motion for a mistrial was denied, (R-871).

It is well-settled law how this question should be asked by the State's prosecutor and the learned prosecutor obviously knew better.

The learned State's prosecutor in this case has more than 15 years as a prosecutor and has achieved the position of Chief Assistant District Attorney. Obviously, he knew how to properly impeach a witness. However, having been caught in the commission of committing reversible error, he then attempted to extricate himself, alleging that the Defense had opened the door for such a question, (R-871). Obviously, this explanation was only a most feeble attempt, at best, to justify the commission of reversible

error. This supposedly justification is not justifiable under any set of applicable code or case law.

Based upon the cases of Dean v. Johnson, 206 So.2d 610 (Ala. 1968) and Parker v. State, 198 So.2d 261 (Ala. 1967), the appellant's motion for a mistrial should have been granted.

This case now before this Honorable Court is easily distinguishable from the case of Alford v. State Farm Fire and Gas. Co., 496 So.2d 19 (Ala. 1986). In the Alford case, the court affirmed Deand and Parker but did not reverse the trial court for not granting the mistrial motion. First, the Alford opinion itself shows a lengthy answer by the appellant without objection. Second,

the opinion notes that "...Mr. Alford had 'previously testified' regarding this matter...". Neither of the grounds cited in Alford are present in this case.

NOW WHEREFORE, because of the trial court's failure to grant the appellant's mistrial based upon the prosecutorial misconduct of the State's prosecutor, the appellant's conviction must be reversed and the appellant's cause remanded to the trial court for a mistral.

IV.

THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO SUSTAIN A CONVICTION AS WELL AS A FAILURE OF THE STATE TO CARRY THE BURDEN OF PROOF WITH REGARD TO THE OFFENSE OF CAPITAL MURDER: THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENSE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE, AS WELL THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE TRIAL.

The evidence introduced at the trial was purely circumstantial. Over one hundred years ago in Ex Parte Acree, 63 Ala. 234 (1879), the Supreme Court of Alabama discussed what was necessary in order to convict a person by use of circumstantial evidence as follows:

> The humane provisions of the law are, that a prisoner, charged with a felony, should not be convicted on circumstantial evidence, unless

> it shows by a full measure of proof that the Defendant is guilty. Such proof is always insufficient, unless it excludes to a moral certainty, every other reasonable hypothesis, but that of the guilty of the accused. Ex parte Acree no matter how strong these circumstances, if they can be reconciled with the theory that some other person may have done the act, then the Defendant is not shown to be guilty, by that full measure of proof which the law requires.

This is not an antiquated statement of the law however, as it has been followed throughout the years by the Supreme Court of Alabama, Dolvin v. State, 391 So.2d 133 (1980); Cumbo v. State, 368 So.2d 871 (1979).

Thus, if the circumstances can be reconciled with the theory that the appellant did not do the alleged act, then the conviction is due to be reversed. It is the appellant's

position that in the case now before this Honorable Court that the circumstances are such that capital murder was not committed by the appellant; and, therefore, the appellant's conviction must be reversed.

The appellant is alleged to have killed both a Mr. Pickens and a Mr. Bailey during the commission of a felony. Mr. Bailey was dead at the scene. However, Mr. Pickens, who was injured at the scene, died later. All of the State's evidence involves a black truck. However, Mr. Pickens stated that the person(s) who committed the offense were in a red vehicle, (R-772).

The appellant is black. However, when asked if the person(s) who shot him were black or white, Mr. Pickens stated they were white, (R-773).

On the testimony and circumstances as a whole one could and must conclude that the appellant did not commit the murders during the commission of a felony in this case; and, therefore, the appellant's conviction must be reversed.

NOW WHEREFORE, the appellant would pray this Honorable Court to reverse and render his conviction in the Circuit Court of Hale County, Alabama, or in the alternative to remand the case to the Circuit Court of Hale County, Alabama for a new trial and for

any further and other relief to which this Court may believe the appellant is entitled.

V.

THE DEATH PENALTY IMPOSED BY THE TRIAL COURT JUDGE IN THIS CAUSE SHOULD BE REVERSED.

Section 13A-5-53(a), Code of Alabama (1975) specifically mandates that if the appellant's conviction is upheld by this Honorable Court that this Honorable Court must then review the propriety of the death sentence. The appellant specifically does not in any manner by the inclusion of this issue within his brief stipulate that his conviction is a valid one. Rather, on the issues previously stated, the appellant specifically contends that

his conviction must be reversed. But, because of the applicable case law hereinabove cited, this issue is included within the appellant's brief.

The appellant's sentencing hearing was held before an advisory jury in accordance with Section 13A-5-46, Code of Alabama (1975). This sentencing hearing was held before the same jury that had heard all of the evidence in this case. The State's attorney specifically stated that they would attempt to show that only two aggravating circumstances existed, (R-858). The trial court instructed the jury that they were only to consider two aggravating circumstances, (R-883). The first aggravating circumstance was the incident which was

the basis of this case. The second aggravating circumstance had occurred 11 days before, (R-865). After hearing all of the evidence and testimony presented, the jury returned a vote of five for the death penalty (42%) while seven voted for life without parole (58%), (R-906).

While counsel fully recognizes that the jury verdict with 58% of the jurors favoring life without parole is advisory only, the only conclusion that can be reached in this case is that after weighing all of the evidence and testimony against the appellant involving the aggravating and mitigating circumstances, that the majority of the trial jury by a margin of 58% to 42%

found that the mitigating circumstances outweighed the aggravating circumstances.

In the highly unlikely event that his issue is ever given serious consideration by this Honorable Court since the appellant's case must be reversed on other grounds as previously stated, then this Honorable Court must reverse the appellant's death penalty and order the imposition of a life-without-parole sentence due to the trial court's refusal to give credence to any mitigating circumstance.

VI.

DEATH BY ELECTROCUTION AS APPLIED BY THE STATE OF ALABAMA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ARTICLE 1, SECTION 15 OF THE CONSTITUTION OF THE STATE OF ALABAMA.

Although the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), held that the penalty of death does not constitute cruel and unusual punishment where the death penalty is constitutionally applied. However, the constitutionality of the application goes not merely to the procedural application of the death penalty, but also into the nature in which the death penalty is carried out. The Alabama Supreme Court in Boykin v. State, 207

So.2d 412, 281 Ala. 559 (1968), held that the death penalty is cruel punishment when it involves torture or lingering death. Although the Alabama Supreme Court has clearly stated that for the death penalty not to be considered cruel and unusual punishment the method of death must result in a swift death and not a lingering death with undue pain and torture. Lee v. State, 227 Ala. 2, 150 So. 164 (Ala. 1933). Recent executions by the state have required more than one application of the electrical charge to be administered before the individual was declared dead. This failure to impose a swift death through the means of electrocution in the Alabama electric chair has been allegedly traced to faulty equipment and inexperienced executioners.

In the case of Jackson v. State, 516 So.2d 726 (Ala.Cr.App. 1985), the Court of Criminal Appeals cites the unpublished order entered June 3, 1983, by Judge Sam C. Pointer in the case of Raines v. Smith, Docket No. 83-P-1080-S (N.D. Ala.), stating that over a period of 50 years the Alabama electric chair had been used approximately 154 times with but one failure, that involving the multiple shocks needed to execute John Lewis Evans. However, since that time, there have been other instances where it has become necessary to repeatedly electrocute an individual in order to carry out the sentence of death.

NOW THEREFORE, the appellant, Victor Ramar Stephens, would pray this Honorable Court to declare the method

of death by electrocution as applied by the State of Alabama to be cruel and unusual punishment and to commute his sentence to life without parole.

CONCLUSION

The United States Constitution and the Alabama Constitution have been ruled by both the Alabama Supreme Court and the United States Supreme Court in Branch and Batson to prohibit prosecutorial misconduct by the State's attorney in the violation of a defendant's Due Process rights through the systematic exclusion of blacks from a jury where the defendant is black. In this case, it was conclusively shown that the first 21 of the State's 22 strikes were of blacks and your

appellant is black. Further, the appellant has shown that these strikes were for obvious racially discriminatory reasons such as "chewing gum" and "wearing sunglasses". Obviously, the State's attorney was simply "grasping at straws" in a flimsy attempt to justify what had previously been ruled to be a prima facie case of racial discrimination. There is no need for this Honorable Court to look further. The appellant's conviction must be reversed.

But, if the Court wishes to look further, there is obvious problems from the start, Batson, to the Court's reversal of the jury verdict of life without parole without the Court's consideration of any mitigating factor.

Further, although the granting of a motion for a mistrial will not be reviewed if it is within the clear discretion of the trial court, the comments made by the prosecutor were ineradicably prejudicial to the defendant, the failure of the Court to grant such motion is an abuse of discretion. In this case, the prosecutor during closing argument clearly stated to the jury that the counsel for the defendant was covering up evidence. Such a statement can only lead to the inference that the defense counsel has committed a crime in attempting to withholding evidence from the Court.

Although the Supreme Court of the United States has held that electrocution as a method of death, per

se, is not cruel and unusual punishment as barred by the Eighth Amendment of the Constitution of the United States, where the application of that punishment involves torture or lingering death such application does reach the level necessary for punishment be deemed both cruel and unusual. The State of Alabama has repeatedly been forced time after time to repeatedly apply an electrical shock to insure the death of an individual sentenced to death. Whether this delayed death by electrocution is the result of incompetency of the executioner or faulty equipment, it is the burden of the state to make sure that death by electrocution is both speedy and without undue pain or torture.

NOW WHEREFORE, the appellant, Victor Ramar Stephens, would pray this Honorable Court to vacate the sentence of the trial court or in the alternative, to commute his sentence from death to life without parole, or in the alternative, to remand this case to the trial court with instructions to grant the motion of the defense for a mistrial.

APPENDIX B

445 Dexter Avenue
Montgomery, AL 36130

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Telephone: 242-4609

Re: 1900032

Ex parte Victor R. Stephens
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Victor R. Stephens vs. State)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.
Per Curiam - Hornsby, C.J., Maddox, Almon, Shores, Adams, Houston, Steagall and Ingram, JJ., concur.

_____ Permission to file amicus curiae briefs granted

_____

4/11/91
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

BEST AVAILABLE COPY